SUPREME COURT, U. S.

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IN THE

# United States Supreme Court

OCTOBER TERM, 1965

No. 264

CONTRACT CARRIERS, INC. and
JOSEPH L. McCORKHILL,
*Petitioners,*

v.

JOHN ANTHONY MARKIEWICZ, a minor
by his father and next friend,
EDWARD MARKIEWICZ, and
EDWARD MARKIEWICZ, and
JENNIE MARKIEWICZ, and
THE GREYHOUND CORPORATION, and
ROBERT L. SCHLAGENHAUF,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

# United States Supreme Court

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**OCTOBER TERM, 1965**

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**CONTRACT CARRIERS, INC. and JOSEPH L. McCORKHILL,**
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**v.**

**JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ, and EDWARD MARKIEWICZ, and JENNIE MARKIEWICZ, and THE GREYHOUND CORPORATION, and ROBERT L. SCHLAGENHAUF,**
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered in the entitled case on March 24, 1966.

## CITATION TO OPINIONS BELOW

Judgment without opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division, was entered following trial without jury. The opinion of the United States Court of Appeals for the Seventh Circuit affirming judgment is reported in 358 F. 2d 26 and is reprinted in Appendix A, p. 2a.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 11, 1966, reprinted in Appendix A, p. 1a. Petition for rehearing *en banc,* timely filed, was denied on March 24, 1966, Appendix A, p. 12a. The jurisdiction of the Court is invoked under 28 USC, Section 1254 (1).

## QUESTIONS PRESENTED

1. Was the determination of causal negligence, based solely on the speed of Petitioners' tractor-trailer which was struck from the rear by the speeding bus, clearly erroneous?

2. Is the determination of negligence, as distinguished from the evidentiary facts upon which it is based, a finding of fact under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure or a conclusion of law freely reviewable on appeal?

3. Did the Circuit Court of Appeals err in not making an independent determination as to whether correct legal standards had been applied by the trial judge to essentially undisputed facts?

4. Is the Circuit Court of Appeals required in a court tried case to determine the correctness of the conclusions of law and to review the inferences drawn from essentially undisputed facts to determine if they are proper and, if so, did the 7th Circuit fulfill its duty in this case?

5. Does the Circuit Court of Appeals have a duty to review the findings of fact in a court tried case to see if they are supported by substantial evidence of probative value and, if so, did the 7th Circuit fulfill its obligation as reviewing court in this case?

6. Did the 7th Circuit Court of Appeals follow correct Federal procedure to resolve a conflict between panels of that court?

## STATUTES AND FEDERAL RULES INVOLVED

§ 47-2006 Burns' Indiana Statutes Annotated (1952 Replacement Supp.)

> "No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with the law."

§ 47-2010 Burns' Indiana Statutes Annotated (1955 Replacement)

> "Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway except as follows:
>
> "1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement; * * *

"5. Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place under the conditions then existing shall be driven in the right hand lane then available for traffic or as close as practicable to the right hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway."

§ 47-2214(c) Burns' Indiana Statutes Annotated (1952 Replacement)

"SEC. 2. When any truck tractor, farm tractor, road tractor or implement of husbandry is operated on a federal or state highway at a speed less than twenty miles per hour, there shall be at least one flashing red signal lamp or red flag mounted, at a height of from ten to twelve feet, on such vehicle which shall be visible to the rear of the vehicle for a distance of at least five hundred feet; Provided, That if such flashing red signal lamp or red flag is not clearly visible for at least five hundred feet when mounted on a combination of vehicles, such lamp or flag shall be mounted on the rear vehicle of such combination of vehicles."

Rule 52(a) Federal Rules of Civil Procedure.

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the op-

portunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

## STATEMENT OF FACTS

This case arose out of a motor vehicle accident which occurred on July 13, 1962, on U. S. 40 near Belleville, Indiana. This accident occurred at approximately 1:05 A.M. when a Greyhound bus struck the left rear of a tractor-trailer operated by Mr. McCorkhill and owned by Contract Carriers, Inc.

At the location of this accident, U. S. 40 is a four-lane, divided highway. There were two lanes for eastbound and two lanes for westbound traffic. The road was straight and the terrain was level to rolling. The weather was clear, the road was dry, and traffic was light. Petitioner McCorkhill was driving his tractor-trailer in the righthand eastbound traffic lane at a speed of 20 to 30 miles per hour. His truck would not go any faster because of a defective accelerator linkage. There were nine (9) red lights on the rear of Mr. McCorkhill's vehicle.

As Mr. McCorkhill was proceeding east, there was another tractor-trailer some distance behind him, also operated in an easterly direction. This unit was driven by a Mr. Stone. Behind Mr. Stone there was a Greyhound bus operated by Mr. Schlagenhauf.

As the three vehicles proceeded toward the point of the accident, the bus passed Mr. Stone going approximately

75 miles per hour which was 10 miles per hour above the speed limit. After clearing Stone's vehicle, it returned to the righthand lane and continued eastward until it collided with the left rear of Petitioners' tractor-trailer. At no time during this sequence of events was there any traffic in the lefthand or passing lane.

The Respondents, John Anthony Markiewicz and Jennie Markiewicz, were passengers on the bus when the collision occurred, and both sustained serious injuries. This case was initiated by Respondents, John Anthony Markiewicz, Jennie Markiewicz, and Edward Markiewicz, the husband of Jennie Markiewicz and father of John Anthony Markiewicz, as a diversity action under 28 U.S.C. §1332, in the United States District Court for the Southern District of Indiana.

During the pre-trial procedure the District Court ordered the bus driver, Robert L. Schlagenhauf, to submit to physical examination which order resulted in an appeal to this court.

> *Robert L. Schlagenhauf, Petitioner* v. *Cale J. Holder, United States District Judge of the Southern District of Indiana* (1964), 379 U. S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234.

After setting forth guidelines for the application of Rule 35 the case was remanded to the District Court. Thereafter trial was had without jury and findings of fact and conclusions of law made and judgments totaling $625,000.00 were entered against Robert L. Schlagenhauf, The Greyhound Corporation, Joseph L. McCorkhill and Contract Carriers, Inc.

The District Court's judgment against the Petitioners, Contract Carriers, Inc. and Joseph L. McCorkhill, was

based upon the speed of Petitioners vehicle which was found to be 20 to 30 miles per hour, and concluded to be a violation of the Indiana slow speed statute, such speed according to the District Judge deceived and misled the driver of the speeding bus that ran into the rear of the Petitioners' vehicle.

Petitioners, Joseph L. McCorkhill and Contract Carriers, Inc., appealed to the 7th Circuit Court of Appeals. Respondents, Robert L. Schlagenhauf and The Greyhound Corporation, did not appeal the judgments rendered against them.

A three judge panel of the 7th Circuit Court of Appeals considered the appeal and affirmed the decision, with Judge Duffy dissenting. The majority opinion of the Court of Appeals concluded that the determination of negligence by the Trial Judge based upon essentially undisputed facts should be treated as finding of fact not to be disturbed by the Court of Appeals, regardless of whether they might have concluded otherwise. A Petition for Rehearing *En Banc* was filed and denied with Judge Duffy dissenting.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### I

### CLEARLY ERRONEOUS JUDGMENTS OF LOWER COURTS SHOULD BE REVERSED.

The decision below should be reviewed because upon consideration of the entire evidence one is left with the definite and firm conviction that a mistake has been committed.

This Court has said it will reverse judgments of lower courts when such judgments are "clearly erroneous." A

judgment is clearly erroneous when even though there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

> *McAllister* v. *U. S.* (1954), 348 U. S. 19, 99 L. Ed 20, 75 S. Ct. 6.

In this case we are confronted with a holding that a truck driver traveling 20 to 30 miles per hour in his proper lane on a divided four-lane highway without more is negligent. This holding is reached in spite of the fact that the truck was traveling east at the extreme right of the highway and there was a second eastbound lane completely clear and unobstructed. This holding is reached even though the truck had nine (9) red lights burning which were visible to the rear for 500 feet. This holding was reached even though the bus which struck the rear of the truck was traveling 75 miles an hour in violation of a speed statute.

Judge Duffy saw the shocking result of this case when he considered all of the evidence in this case. In his dissenting opinion he said:

> "I respectfully dissent. At the time of the collision, the tractor-trailer was traveling entirely within the righthand lane of the two eastbound traffic lanes. Under Indiana law, this is where the tractor-trailer should have been. There were nine red lights lit on the rear of the trailer visible for a distance of some 500 feet or more. These lights were in compliance with Indiana statutes and interstate commerce regulations. The tractor-trailer was traveling on a divided four-lane highway which, at the point of the accident, was straight and of level to rolling terrain. It had wide shoulders. The weather was clear and dry with good

visibility. The Court found the tractor-trailer had been traveling at a speed of 20 to 30 miles per hour, although the probative evidence shows the speed to have been 25 to 30 miles per hour.[1]

"I am convinced that if the tractor-trailer had been traveling at a speed of 30 to 40 miles per hour, or even at a higher speed, the collision would still have occurred. It is of no importance whether a faulty accelerator part was the reason for the 20 to 30 mile speed, or whether the tractor-trailer was slowing down to turn into the next filling station. In this case, the cause of the tractor-trailer's speed cannot be a proximate cause of the collision.

"The bus driver, Schlagenhauf, had the entire inner east-bound lane in which to pass the tractor-trailer. This lane was clear, unobstructed, and about fourteen feet in width.

"The majority opinion affirms the District Court in holding the driver of the tractor-trailer violated the Indiana statute which provides—'No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with the law.' Burns' Indiana Statutes Annotated (1952 Replacement, Supp.) § 47-2006

"It is apparent that a slow moving vehicle can impede the normal and reasonable movement of traffic on a 2-lane highway, but it is beyond my comprehension how this can be done by a vehicle traveling in the extreme right-hand lane of a four-lane highway where the second east-bound lane is clear and free from all obstruction. These are the circumstances present in this case.

"The District Court also suggested the tractor-trailer should have had warning lights in addition to

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[1] The evidence in this case consists mainly of depositions and other documentary evidence.

the nine which were lit. However, the Indiana Statutes make it clear that vehicles proceeding at less than normal speed of traffic are specifically authorized to continue operating upon the highways without additional warning lights as long as they operate as close as possible to the right-hand side of the highway, unless the vehicle's speed is less than 20 miles per hour. That is not the situation in the case at bar.

"There was no minimum speed limit in effect at the time and place in question. The highway was not an expressway, freeway, or any other type of limited access highway.

"The collision occurred because of the bus driver's lack of look-out. The bus was traveling at a speed of about 75 miles an hour. In my judgment, the failure of Schlagenhauf, the driver of the bus, to keep a proper look-out was the sole, active, direct, independent and effective cause of the plaintiffs' injuries. *Hayes Freight Lines v. Wilson,* 226 Ind. 1, 77 N. E. 2d 580; *Huey v. Milligan,* 242 Ind. 93, 175 N. E. 2d 698."

It is manifestly unjust for Petitioners, Contract Carriers, Inc. and Joseph L. McCorkhill, to be held jointly and severally liable with Respondents, Greyhound Corporation and Robert L. Schlagenhauf, for the judgments of $625,000.00 simply because the vehicle driven by Mr. McCorkhill was traveling 20 to 30 miles per hour, when it was struck from the rear by a speeding bus. The final result of this case is so shockingly wrong as to warrant this Court to consider the facts and apply the law.

## II

## THE FAILURE OF LOWER COURTS TO PROPERLY CONSTRUE AND APPLY DECISIONS AND GUIDELINES ESTABLISHED BY THE SUPREME COURT IS A DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE WHICH SHOULD BE CORRECTED.

The Court of Appeals misconstrued and misapplied earlier decisions and guidelines of the Supreme Court thereby departing from the accepted and usual course of judicial procedure. In reviewing the decision of the District Court, the Court of Appeals refused to review the findings of fact to determine if they were supported by the quantity and quality of evidence required by Federal procedure, and refused to review the District Court's conclusions of law.

This Court has held that findings of fact without the support of substantial evidence of probative value, conclusions of law and mixed findings of fact and conclusions of law are not binding on the reviewing court.

*Helvering* v. *Tex Penn Oil Co.* (1936), 300 U. S. 481, 81 L. Ed 755, 57 S. Ct. 569.

### A

### REVIEWING COURTS SHOULD DETERMINE IF THERE IS SUBSTANTIAL EVIDENCE OF PROBATIVE VALUE WHICH, WHEN CONSIDERED IN LIGHT OF OTHER CREDIBLE EVIDENCE, REFLECTS OR REPRESENTS THE TRUTH AND RIGHT OF THE CASE.

It is settled Federal procedure that a reviewing court will determine if there is substantial evidence of probative value which, when considered in light of other credible

evidence, will reflect or represent the truth and right of the case. Also, it is settled Federal procedure that a reviewing court will determine whether the District Court misconstrued the evidence.

*Sanders* v. *Leach* (5th CCA, 1946), 158 F. 2d 486;

*Western Cotton Oil Company* v. *Hodges* (5th CCA, 1954), 218 F. 2d 158.

The Seventh Circuit Court of Appeals failed to follow this accepted procedure.

A fair recital of the evidence establishes that Petitioners' vehicle had nine (9) red lights on the rear of the trailer all properly lighted; that it was being operated entirely in the right lane of the two eastbound lanes of the highway proceeding at 20 to 30 miles per hour with the other lane for eastbound traffic clear; that eastbound traffic was light, weather was clear and dry, and visibility good. The bus passed another tractor-trailer unit operated by one Stone going 75 miles per hour in violation of speed statutes. The bus cleared Stone's vehicle then pulled into the lane occupied by Petitioners' truck and continued eastward until the bus crashed into the rear of Petitioners' truck. Stone testified that after the collision he then did everything in his power to stay out of the collision debris.

Upon this evidence, the trial court found:

> "11. The low speed of the tractor-trailer unit as determined in these findings of fact impeded the normal and reasonable movement of traffic at the time and place in question and its slow speed was deceptive and misleading to the safety of those operators approaching from the rear of the unit including the operator of the bus and Mr. Stone, the operator of the other tractor-trailer, who was barely able to avoid the colliding vehicles."

This finding, based upon mental operations of the bus driver and omnisciently ascribing to him a state of mind, is so speculative and conjectural that it does not reasonably represent a finding of fact or an inference from a fact. The impropriety of this so-called finding of fact renders clear the merit of the dissenter's position that no causal relationship exists between the conduct of the Petitioners and the accident. The examination of the whole evidence at the appellate level by the dissenting judge demonstrates the functions which should have been performed by the Circuit Court of Appeals. When that is done, it is obvious that the finding that the driver of the bus was misled and deceived under the circumstances by the restricted speed of the Petitioners' tractor-trailer is not supported by substantial evidence with probative value, but is a judge-made justification to buttress a result that fails to conform to the standards required by Federal procedure. It is vital that Courts of Appeal provide effective review in order for the Federal judiciary system to function.

## B

## THE EXISTENCE OR NON-EXISTENCE OF NEGLIGENCE IS A LEGAL CONCLUSION

The existence or non-existence of negligence is a legal conclusion.

> *Gediman* v. *Anheuser-Busch, Inc.* (2d CCA, 1962), 299 F. 2d 537, 542.

The Seventh Circuit Court of Appeals, however, considered it a factual question when it held:

> "The real issue on this appeal concerns the question of appellant's causal negligence. Whether or not, under the circumstances revealed by the record, the

> operation of the Contract Carriers, Inc. tractor-trailer was at such a low speed as to deceive others upon the highway and to constitute an impediment to traffic must be determined by the trier of the facts."

This holding was made in spite of the rule laid down by this Court in *United States* v. *Mississippi Generating Company* (1961), 364 U. S. 520, 81 S. Ct. 294, 5 L. Ed 2d 268, when it held:

> "However it should be noted that our reliance upon the findings of fact does not preclude us from making an independent determination as to the legal conclusions and inferences which should be drawn from them."

If this deviation from an accepted standard is erroneously embraced by the Seventh Circuit, many litigants other than those now before this Court will be adversely affected. But if injustice results to even one litigant, it is sufficient reason for this Court to reassert its directive that conclusions of law be reviewed. The tendency of the Circuit Court of Appeals to dodge issues by erroneously labeling conclusions of law as findings of fact demands corrective action. Without such action, review in court-tried cases becomes meaningless.

## C

## WHERE THE FACTS ARE ESSENTIALLY UNDISPUTED THE APPLICATION OF A STANDARD TO SUCH FACTS PRESENTS ONLY A QUESTION OF LAW.

The Seventh Circuit Court of Appeals further deviated from the accepted and usual course of judicial procedure in failing to review the standard applied with reference to the Indiana slow speed statute. This deviation is in clear conflict with prior decisions of this Court.

*U. S.* v. *Singer Mfg. Co.* (1963), 374 U. S. 174, 10 L. Ed. 2d 823, 83 S. Ct. 1773;

*U. S.* v. *Parke, Davis & Co.* (1960), 362 U. S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503.

Both *Singer* and *Parke Davis* held that where there are essentially undisputed facts the application of a standard necessarily presents only a question of law. Meaningful review is lost when the appeal court refuses to disturb a trial judge's determination that there has been a violation of a slow speed statute upon the ground that such determination is a finding of fact. The speed of the tractor-trailer was a fact but whether there was a violation of the statute is a legal conclusion. The appeals court may and should make an independent determination as to the legal conclusions and inferences which should be drawn from the facts. Unless the appeal court performs this function, a party achieves no review. Because the Court of Appeals declined to review the standard applied by the District Court a greater burden has been placed on this Court. This case should be reviewed by this Court to settle the proper function of the Court of Appeals to review legal standards applied by a trial court.

## III

## WHERE THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A JUDGE'S DETERMINATION OF NEGLIGENCE, AS DISTINGUISHED FROM THE EVIDENTIARY FACTS LEADING TO IT, IS A CONCLUSION OF LAW OR A FINDING OF FACT, SUCH CONFLICT SHOULD BE RESOLVED BY THIS COURT.

The decision below should be reviewed because the Sev-

enth Circuit Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter.

A conflict has developed among the circuits as to whether a judge's determination of negligence is a conclusion of law, fully reviewable upon appeal, or a finding of fact as contemplated by Rule 52(a) of the Federal Rules of Civil Procedure, which can be set aside only if clearly erroneous.

It has been held in the Second Circuit that:

> "A Judge's determination of negligence, as distinguished from the evidentiary facts leading to it, is a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the 'unless clearly' erroneous rule."
>
> *Gediman* v. *Anheuser-Busch, Inc.* (2nd CCA, 1962), 299 F. 2d 537, 542.

The Fourth Circuit has also adhered to the principle set out in the *Gediman* case.

*Olah* v. *S. S. Jaladurga* (4th CCA, 1965), 343 F. 2d 457.

The Sixth and Ninth Circuits have held that determination of negligence is a finding of fact not to be overturned unless "clearly erroneous."

*Pacific Tow. Boat Co.* v. *States Marine Corp. of Dela.* (9th CCA, 1960), 276 F. 2d 745;

*Imperial Oil, Limited* v. *Drlik* (6th CCA, 1956), 234 F. 2d 4.

The conflict has been demonstrated in a recent case arising in the Court of Appeals for the District of Co-

lumbia. In *Socash* v. *Addison Crane Company* (1965, USCA, DC), 346 F. 2d 430, the Court affirmed the lower court with the main opinion holding that the determination of negligence was a finding of fact and not to be overturned unless "clearly erroneous," whereas the concurring opinion took the position that the determination of negligence was a conclusion of law and freely reviewable.

A definite conflict exists among the Circuits on the question of whether the determination of negligence is a conclusion of law or a finding of fact. The distinction is a fundamental concept necessary to the proper functioning of the Federal judicial system. The vast amount of negligence litigation pending in the Federal Courts makes it imperative that this conflict be resolved by this Court.

The majority decision of the Seventh Circuit in this case is in direct conflict with the Second Circuit, Fourth Circuit and the concurring opinion of the recent case in the Court of Appeals for the District of Columbia. Uniformity of opinion on such an important principle of law in the Federal system is vital. This conflict should be resolved by this Court.

## IV

## WHERE A COURT OF APPEALS REFUSES TO RESOLVE A CONFLICT AS TO AN IMPORTANT RULE OF LAW EXISTING BETWEEN PANELS OF JUDGES OF THE CIRCUIT, THIS COURT MAY EXERCISE ITS SUPERVISING POWER AND TAKE REMEDIAL ACTION.

The decision below should be reviewed because there exists within the Seventh Circuit Court of Appeals a conflict as to whether the determination of negligence is an

evidentiary fact not subject to review or whether it is a conclusion of law which will permit meaningful review.

In *U.S.* v. *Rogers* (7th CCA, 1965), 345 F. 2d 357, 359, the Seventh Circuit Court of Appeals, recognized that the determination of negligence is a conclusion of law by citing with approval the Second Circuit *Gediman* case. In the instant case the Seventh Circuit Court of Appeals held that the determination of negligence is an evidentiary finding of fact and not subject to review. Hence, the conflict which exists between the Circuits also exists between panels of the Seventh Circuit.

Although differences within a circuit are normally to be resolved by the Court of Appeals, if it refuses to do so no other remedy exists than for this Court to exercise its supervising power. This court has held that a conflict within a circuit on an important question is sufficient reason to exercise this court's jurisdiction.

*Dickinson* v. *Petroleum Conversion Corp.* (1950), 338 U. S. 507, 94 L. Ed. 299.

The Petitioners raised this point in their Petition for Rehearing *En Banc,* but the Seventh Circuit Court of Appeals refused to resolve the conflict.

## V

## THE PROPER CONSTRUCTION OF "SLOW SPEED" STATUTES WHICH AFFECT CITIZENS OF THE UNITED STATES WHILE OPERATING MOTOR VEHICLES IN THIRTY-SIX DIFFERENT STATES IS A MATTER WARRANTING THE ATTENTION OF THIS COURT.

The decision below should be reviewed because the con-

struction placed upon the Indiana slow speed statute by the District Court, and approved by the Court of Appeals, affects vehicular traffic throughout the United States. Thirty-six states have a slow speed statute similar to the Indiana statutes.[1] Proper construction of such statutes is important in light of the constant growth of interstate motor vehicle traffic. With such an important question before the Court, the matter was decided with a shocking result. The trial court found as a matter of law that a tractor-trailer going 20 to 30 miles per hour in the outside lane of a four-lane, divided highway was in violation of this statute proximately causing the collision. This finding was made even though there were fourteen (14) feet of clear, unobstructed highway for the bus to use to pass. This finding was made even though the tractor-trailer was traveling at the extreme right-hand side of the highway. This finding was made even though the tractor-trailer was displaying nine (9) red lights on the rear. But even more shocking, this finding determined that by going 20 to 30 miles per hour, the normal and reasonable movement of traffic that was impeded was a bus going 75 miles per hour, which was 10 miles an hour above the speed limit.

If this decision is correct, then every vehicle slowing down for turns, hills or any other reason is in violation of a slow speed statute, if operating in one of the 36 states having such statutes. It is of national interest that the Indiana statute (which is similar or identical to the statutes of 36 states) be construed so as to protect the rights and determine the obligations of all motor vehicle operators.

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[1] See Appendix B, p. 14a for list of States and statute citations.

## CONCLUSION

When all of the evidence in this case is considered, the judgment of the trial court is clearly erroneous. Yet, the Seventh Circuit Court of Appeals failed to grant relief to the Petitioners because the majority failed to grasp the concept that clearly erroneous judgments should be reversed. This result is obviously reached because the appeals court misunderstood the principles laid down by this Court that findings of fact are reviewable if not supported by substantial evidence of probative value; and that conclusions of law are always reviewable.

The opinion of the Seventh Circuit Court of Appeals added to the confusion in determining that negligence is an evidentiary fact, and not a legal conclusion. With this holding, there is a definite split among the Circuits on this fundamental question. The confusion is compounded as the Seventh Circuit has itself held both ways on this question. Clarification of such an important question is vital, particularly since there has been such a tremendous increase in the number of negligence cases. The need for clarification in the instant case is even more important because of the impact of this decision throughout the country.

The issuance of a Writ of Certiorari by this Court is necessary for the ultimate administration of justice.

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**Appendix A**

IN THE

# United States Court of Appeals

FOR THE SEVENTH CIRCUIT

**Chicago 10, Illinois**
Tuesday, January 11, 1966

**No. 15304**

Before

Hon. *JOHN S. HASTINGS, Chief Judge*
Hon. *F. RYAN DUFFY, Circuit Judge*
Hon. *KENNETH P. GRUBB, District Judge* (Senior)

**JOHN ANTHONY MARKIEWICZ, a minor etc., et al.,**
*Plaintiffs-Appellees,*
v.
**THE GREYHOUND CORPORATION, et al.,**
*Defendants,*
**CONTRACT CARRIERS, INC., et al.,**
*Defendants-Appellants.*

**Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.**

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with cost, and interest, in accordance with the opinion of this Court filed this day.

IN THE

# United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 15304 SEPTEMBER TERM AND SESSION, 1965

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ, and EDWARD MARKIEWICZ, and JENNIE MARKIEWICZ,
*Plaintiffs-Appellees,*

v.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, NATIONAL LEAD COMPANY,
*Defendants,*

CONTRACT CARRIERS, INC., and JOSEPH L. McCORKHILL,
*Defendant-Appellants.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

JANUARY 11, 1966

Before HASTINGS, *Chief Circuit Judge,* DUFFY, *Circuit Judge,* and GRUBB, *Senior District Judge.*

GRUBB, *Senior District Judge.* This diversity of citizenship action to recover damages for personal injuries and related expenses sustained by plaintiffs was tried to the court. Final judgment was entered for the plaintiffs and against defendants, The Greyhound Corporation; Robert L. Schlagenhauf; Contract Carriers, Inc.; and Joseph L. McCorkhill. The appeal is taken by Contract Carriers, Inc. and McCorkhill only.

On July 13, 1962, plaintiffs, John Anthony Markiewicz and Jennie Markiewicz, were passengers riding on a Greyhound bus operated by Schlagenhauf in the eastbound lanes of United States Highway 40, a four-lane divided highway, between Stilesville and Belleville, Indiana. About 1:05 A.M., the bus struck the left rear of a Trailmobile trailer being pulled by a 1960 G.M.C. tractor operated by McCorkhill, as a driver for Contract Carriers, Inc.

The court found that the G.M.C. tractor had experienced loss of ability to produce normal forward speed for over 100 miles before it reached the point of collision. McCorkhill had made several stops to investigate the cause of the power failure and had contacted the dispatcher of Contract Carriers, Inc. at Anderson, Indiana, advising him that the maximum forward speed of his vehicle was about 30 miles per hour. The dispatcher authorized McCorkhill to operate the unit to its destination. McCorkhill was unable to effect any repair and proceeded eastward on Highway 40 at a speed approximating 20 to 30 miles per hour. Immediately prior to the collision, the rear of the trailer carried 9 red lights which were all properly lighted. At all times in question McCorkhill operated the tractor-trailer in the southernmost lane of the two lanes of Highway 40 designated for eastbound traffic.

The cause of the slowdown of McCorkhill's vehicle was a progressive accelerator breakdown which diminished the amount of acceleration progressively. Before this collision, Contract Carriers, Inc. had experienced this type of defect with all of the tractors of this type and provided a spare part in the glove compartment for emergency repair.

Schlagenhauf, the operator of the Greyhound bus, had overtaken an eastbound trailer-tractor operated by one Louie L. Stone in the southernmost lane of Highway 40.

After passing the Stone vehicle, Schlagenhauf operated his right turn signals, executed lighting courtesy signals to Stone, turned the bus from the northernmost lane to the southernmost lane in front of the Stone vehicle, and reviewed the passed vehicle in his rear view mirror. He observed red lights in front of him and started to return the bus to the northernmost lane to pass the vehicle. The collision occurred in the southernmost lane when the right front parts of the bus engaged the left rear of the trailer. Less than 10 seconds elapsed between the time Schlagenhauf passed the Stone vehicle and the instant of the impact.

At the time of and immediately prior to the collision, Schlagenhauf operated the bus at 75 miles per hour. He did not correctly associate the proximity of the red lights he observed in front of him after passing the Stone vehicle and did not correctly compare his speed with the speed of said lights during and immediately after passing the Stone vehicle. Schlagenhauf did not reduce the speed of the bus or apply the brakes prior to the collision. He did not recognize that a collision was imminent until it was too late to avoid it, although he attempted ineffectively to turn the steering wheel of the bus further to the left when he realized the situation.

At the time in question, Highway 40 between Stilesville and Belleville, Indiana, and particularly at the point of the collision, was straight and level to rolling. The adjacent property was devoted to farming with a minimum of farm residential dwellings, filling stations, and intersecting county highways. Posted speed limits authorized speed of buses at 65 miles per hour and speed of tractor-trailer units at 55 miles per hour. The eastbound traffic was normal to light. Road and weather conditions were optimal for that hour of traveling on a public highway.

The District Court made this finding:

> "11. The low speed of the tractor-trailer unit as determined in these findings of fact impeded the normal and reasonable movement of traffic at the time and place in question and its slow speed was deceptive and misleading to the safety of those operators approaching from the rear of the unit including the operator of the bus and Mr. Stone, the operator of the other tractor-trailer, who was barely able to avoid the colliding vehicles."

The court concluded that Schlagenhauf, and, by application of the Indiana rule of *respondeat superior*, The Greyhound Corporation were guilty of causal negligence by operating the bus at an excessive speed and by failing to keep a reasonable lookout for other vehicles using the highway. The court further concluded that McCorkhill, and, by application of the doctrine of *respondeat superior*, Contract Carriers, Inc. were guilty of causal negligence in the operation of the tractor-trailer at such a low speed as to deceive other operators on the highway and to impede the normal and reasonable movement of vehicular traffic, in violation of Burns' Indiana Statutes, 1962 Cumulative Supplement, Volume 8, Part 2, § 47-2006; in failing to perform the common law duty of ordinary care by operating the tractor with knowledge that it did not have sufficient power to tow the trailer at sufficient speed to avoid impeding the normal flow of traffic, and in towing the trailer under these circumstances without giving warning to vehicles approaching from the rear as to its low speed and presence on the road by flares, extra lamps, or other brightly illuminated devices.

Section 47-2006 of Burns' Indiana Statutes, 1952 Cumulative Supplement, Volume 8, Part 2, provides as follows:

> "No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with law."

What constitutes illegal "low speed" under the statute involves a question of fact for the trier of the cause to be determined under the circumstances of the case. *Pohlman* v. *Perry*, 122 Ind. App. 222, 103 N. E. 2d 911, 915 (1952).

Significant factors to be considered in the instant case are the time and opportunity available to Schlagenhauf for observing and evaluating the relative position and the speed of the Contractor Carriers, Inc. vehicle. The evidence shows that Schlagenhauf approached from the rear. His view of this vehicle had been obstructed by the intervening tractor-trailer operated by Stone. On clearing the Stone tractor-trailer, Schlagenhauf reached a position from which he could observe the lights mounted on the rear of the trailer towed by the Contract Carriers, Inc. tractor. At this time, his attention was also directed to the vehicle he had just passed. Schlagenhauf's belief that the lights ahead were no cause of concern to him and his action in returning the bus to the southernmost lane clearly indicate that he made an erroneous assessment of the situation.

Although the mistake in judgment was that of Schlagenhauf, it does not follow that the collision, as a matter of law, must necessarily be attributed solely to him. His conduct in passing and giving attention to the Stone vehicle may be characterized as normal incidents of highway travel. Further, the normal flow of traffic does not exclude a situation in which the operator of one vehicle may have but a few seconds in which to arrive at an evaluation as to the speed and relative location of another vehicle on the highway. Under such circumstances, a vehicle proceeding

at an unusually slow speed, that is, unusual in light of the conditions of the road, the hour of travel, the amount of traffic on the highway, and the type of vehicle involved, may, by the very unexpectedness of its speed, mislead the operator of another vehicle who lacks opportunity for a more prolonged observation.

Schlagenhauf's negligence in the operation of the bus at an excessive speed and in failing to maintain a proper lookout unquestionably contributed to the impairment of his judgment. In light of his limited opportunity for observation of the Contract Carriers, Inc. vehicle, his error may reasonably be found to have been induced also by the fact that the tractor-trailer was being operated at an unusually low speed—possibly as low as 20 miles per hour—of which its lights and general appearance on the highway gave no indication.

We are not here concerned with a comparison of the negligence of the respective tortfeasors, or with the problem of intervening or superseding causes. The issue before the court is whether the record supports a finding that the speed at which the Contract Carriers, Inc. vehicle was being operated constituted causal negligence as to the plaintiffs in that it misled and deceived the driver of the bus, and impeded the flow of traffic on the highway. This finding will not be disturbed on appeal if it may be sustained upon a rational view of all of the evidence including all reasonable inferences of which the testimony is susceptible. *Smoczynski* v. *United States,* 352 F. 2d 44, 47 (7th Cir. 1965).

Consideration of the record discloses that the operation of the Contract Carriers, Inc. vehicle in the manner and under the circumstances shown here may be found to have contributed to Schlagenhauf's error in judgment as to the

relative position and speed of the vehicle, and that the operation of said vehicle thereby constituted a concurring, substantial factor, together with the negligence of the driver of the bus, in bringing about the harm to plaintiffs. The standards of causal negligence under Indiana law are met thereby. *Huey* v. *Milligan,* 242 Ind. 93, 175 N. E. 2d 698, 703 (1961). The manner of operation of said vehicle as determined by the district court further may be deemed to have impeded the normal and reasonable flow of traffic in violation of § 47-2006, Burns' Indiana Statutes.

The fact that an unobstructed lane of travel, that is, the northernmost of the eastbound lanes, may have been available to Schlagenhauf, does not as a matter of law obviate causal negligence which contributed to the bus driver's determination not to follow the unobstructed lane. See *Seaton* v. *Spence,* 215 Cal. App. 761, 30 Cal. Rptr. 510 (1963). Appellants' further theory that the collision would have occurred regardless of the speed of the tractor-trailer because of Schlagenhauf's conduct presents an area of speculation which has no support in the record and is not necessarily to be inferred from the evidence in the case.

The additional specifications of causal negligence found by the district court rest on the validity of the finding of causal negligence in the operation of the tractor-trailer at such deceptively low speed as to impede the flow of traffic. It is undisputed that the operator of the Contract Carriers, Inc. vehicle proceeded upon the highway with knowledge of the impairment of its capacity for attaining reasonable speed and without providing said vehicle with additional lights or warning devices to alert others to this condition. This conduct may be deemed to constitute negligence. It is unnecessary to decide the question whether or not this negligence must also be deemed to constitute additional independent instances of causal negligence since the affirm-

ance of the determination as to the violation of the Indiana low speed statute suffices to sustain the judgment.

The real issue on this appeal concerns the question of appellants' causal negligence. Whether or not, under the circumstances revealed by the record, the operation of the Contract Carriers, Inc. tractor-trailer was at such a low speed as to deceive others upon the highway and to constitute an impediment to traffic must be determined by the trier of facts. It is the function of the trier of facts to weigh the evidence presented by oral testimony in the case. *Koehler* v. *Ellison*, 226 F. 2d 682, 686 (7th Cir. 1955). All reasonable inferences of which the evidence of record is susceptible drawn by the trier of facts must be accepted by the reviewing court regardless of whether its members might have reached opposing inferences. *Alster* v. *Alster and Associates, Inc.*, 319 F. 2d 54, 55 (7th Cir. 1963). The findings of the district court, serving as the trier of facts in this case, as to causal negligence by a deceptively low speed and by impeding traffic has sufficient support in the record. The judgment is AFFIRMED.

DUFFY, *Circuit Judge*, dissenting.

I respectfully dissent. At the time of the collision, the tractor-trailer was traveling entirely within the right-hand lane of the two east-bound traffic lanes. Under Indiana law, this is where the tractor-trailer should have been. There were nine red lights lit on the rear of the trailer visible for a distance of some 500 feet or more. These lights were in compliance with Indiana statutes and interstate commerce regulations. The tractor-trailer was traveling on a divided four-lane highway which, at the point of the accident, was straight and of level to rolling terrain. It had wide shoulders. The weather was clear and dry with

good visibility. The Court found the tractor-trailer had been traveling at a speed of 20 to 30 miles per hour, although the probative evidence shows the speed to have been 25 to 30 miles per hour.[1]

I am convinced that if the tractor-trailer had been traveling at a speed of 30 to 40 miles per hour, or even at a higher speed, the collision would still have occurred. It is of no importance whether a faulty accelerator part was the reason for the 20 to 30 mile speed, or whether the tractor-trailer was slowing down to turn into the next filling station. In this case, the cause of the tractor-trailer's speed cannot be a proximate cause of the collision.

The bus driver, Schlagenhauf, had the entire inner east-bound lane in which to pass the tractor-trailer. This lane was clear, unobstructed, and about fourteen feet in width.

The majority opinion affirms the District Court in holding the driver of the tractor-trailer violated the Indiana statute which provides—"No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with the law." Burns' Indiana Statutes Annotated (1952 Replacement) (Supp) § 47-2006.

It is apparent that a slow moving vehicle can impede the normal and reasonable movement of traffic on a 2-lane highway, but it is beyond my comprehension how this can be done by a vehicle traveling in the extreme right-hand lane of a four-lane highway where the second east-bound lane is clear and free from all obstruction. These are the circumstances present in this case.

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[1] The evidence in this case consists mainly of depositions and other documentary evidence.

The District Court also suggested the tractor-trailer should have had warning lights in addition to the nine which were lit. However, the Indiana statutes make it clear that vehicles proceeding at less than the normal speed of traffic are specifically authorized to continue operating upon the highways without additional warning lights as long as they operate as close as possible to the right-hand side of the highway, unless the vehicle's speed is less than 20 miles per hour. That is not the situation in the case at bar.

There was no minimum speed limit in effect at the time and place in question. The highway was not an expressway, freeway, or any other type of limited access highway.

The collision occurred because of the bus driver's lack of look-out. The bus was traveling at a speed of about 75 miles an hour. In my judgment, the failure of Schlagenhauf, the driver of the bus, to keep a proper look-out was the sole, active, direct, independent and effective cause of the plaintiffs' injuries. *Hayes Freight Lines* v. *Wilson,* 226 Ind. 1, 77 N. E. 2d 580; *Huey* v. *Milligan,* 242 Ind. 93, 175 N. E. 2d 698.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

IN THE

# United States Court of Appeals

FOR THE SEVENTH CIRCUIT

**Chicago, Illinois 60604**

Thursday, March 24, 1966

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**No. 15304**

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Before

Hon. *JOHN S. HASTINGS, Chief Judge*

Hon. *F. RYAN DUFFY, Circuit Judge*

Hon. *ELMER J. SCHNACKENBERG, Circuit Judge*

Hon. *WIN G. KNOCH, Circuit Judge*

Hon. *LATHAM CASTLE, Circuit Judge*

Hon. *ROGER J. KILEY, Circuit Judge*

Hon. *LUTHER M. SWYGERT, Circuit Judge*

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**JOHN ANTHONY MARKIEWICZ, a minor, etc., et al.,**
*Plaintiffs-Appellees,*
v.
**JOSEPH L. McCORKHILL and CONTRACT CARRIERS, INC.,**
*Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

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On consideration of the petition of defendants-appellants, Contract Carriers, Inc. and Joseph L. McCorkhill, for rehearing *en banc* of the above case, together with the answers of the plaintiffs-appellees in opposition thereto, and the supporting brief of American Trucking Associations, Inc., amicus curiae, and the various answers thereto;

IT IS ORDERED by the Court that the petitions of American Trucking Associations, Inc. and United Farm Bureau Insurance Company of America to file briefs, as amicus curiae, in support of the petition for rehearing *en banc,* be and the same are hereby denied; and

IT IS FURTHER ORDERED by the Court that the petition of defendants-appellants, Contract Carriers, Inc. and Joseph L. McCorkhill, for a rehearing *en banc* be and the same is hereby denied.

Duffy, Circuit Judge, voted to grant the petition for rehearing *en banc.*

## Appendix B

Alabama—Alabama Statutes, Tit. 36, Sec. 58 (2);

Arizona—Ariz. R. S. Sec. 28-704;

Arkansas—Ark. Stat. Anno. (1947), Sec. 75-604;

California—West's Cal. Code Anno., Sec. 22400;

Colorado—Colo. R. S. 1963, Sec. 13-5-35;

Connecticut—Conn. G. S. Anno., Sec. 14-220;

Delaware—Dela. Code Anno., Sec. 4171;

Florida—Fla. Stat. Anno., Sec. 317.22 (6);

Georgia—Code of Ga. Anno., Sec. 68-1629;

Idaho—Idaho Code, Sec. 49-704;

Illinois—S.-H. Ill. Stats. Anno. 95½, Sec. 148;

Indiana—Burns' Ind. Stats. Anno., 47-2006;

Iowa—Ia. Code Anno., Sec. 321-294;

Kansas—Kan. Stats. Anno., Sec. 8-534;

Maine—Maine R. S. Anno., Sec. 29-1253;

Minnesota—Minn. Stats. Anno., Sec. 169.15;

Missouri—Vernon's Anno. Stats. of Missouri, Sec. 304.611;

Nebraska—R. S. of Nebr. 1943, Sec. 39-723.02;

Nevada—Nev. R. S., Sec. 484.093;

New Hampshire—N. H. R. S. Anno., Sec. 262-A:57;

New Jersey—New Jersey Stats. Anno., Sec. 39:4-97.1;

New Mexico—N. M. Stats. 1953 Anno., Sec. 64-18-4;

New York—McKinney's Consol. Laws of N.Y. Anno., Sec. 1181;

North Carolina—Gen. Stats. of N.C. Anno., Sec. 20-141 (h);

North Dakota—N.D. Century Code Anno., Sec. 39-09-02, Sec. 39-09-01;

Ohio—Sec. 4511.22 Baldwin's Revised Ohio Code & Serv. (6307-22);

Oklahoma—Okla. Stats. Anno. 47, Sec. 11-804;

Oregon—Ore. R. S., Sec. 483.112;

Pennsylvania—Purdon's Penna. Stat. 75-1002;

Rhode Island—General Laws of Rhode Island 31-14-9;

S. Carolina—Code of Laws of S. C., Sec. 46-372;

Tennessee—Tennessee Code 59-854;

Utah—Utah Code 41-6-49;

Virginia—Code of Virginia, Sec. 46.193(g);

W. Virginia—Code of W. Va., Sec. 1721 (335a) (3a);

Wisconsin—West's Wisconsin Stats. Anno., Sec. 85-40(6);

Wyoming—Wyoming Stats.—1957, Section 31-133.